IN THE

Supreme Court of the United States.

No. . October Term, 1942.

WILLIAM FOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINION OF THE COURT BELOW.

The opinion of the District Court (R. 84a) is reported at 43 Fed. Sup. 582. The opinion of the Circuit Court below (R. 94-100) filed August 4, 1942 is still unreported.

II. STATEMENT OF THE CASE.

A statement of the case has been made in the preceding petition under I (pp. 1-4), which is hereby adopted and made a part of this brief.

III. STATUTE INVOLVED.

Title 18 U. S. C. A., Sec. 88:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the

object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

IV. SPECIFICATION OF ERRORS.

A.

The nolle prosequi as to the co-defendants destroyed the only legal basis for petitioner's conviction and the courts below erred in refusing to vacate the judgment of conviction (assignments of Error nos. 4, 5, 6 (R. 89a, 90a)).

B.

The courts below erred in refusing to permit petitioner to withdraw his plea of guilty (assignments of Error 1, 2, 3 (R. 89a)).

ARGUMENT.

Point I.

The Nolle Prosequi As to the Co-Defendants Destroyed the Only Legal Basis for Petitioner's Conviction and the Motion to Vacate the Conviction Should Have Been Granted.

(A)

Although the indictment alleged conspiracy with other persons unknown, this allegation was a mere formality without any support in fact (R. 67a-68a; 74a-75a; 80a-82a) and was abandoned by the government on the argument of the appeal below, the government attorney stating that there was no evidence to support it. (R. 96.) The indictment, therefore, deals only with the three named defendants.

However, the nolle prosequi entered as to the two other defendants removed them from the indictment and, as was correctly stated in the opinion below (R. 97), terminated the proceedings against them.

> *United States v. Rossi,* 39 Fed. (2d) 432, 433 (C. C. A. 9, 1930).

By its action in nolle prossing the indictment against the co-defendants, the government removed every person except petitioner from the alleged conspiracy. There were no others, named or unnamed, against whom the case remained untried or unadjudicated. *Petitioner was thereby placed in the unsupportable position of having been held guilty of conspiracy without any co-conspirator.*

The fact that petitioner was convicted upon his own guilty plea is immaterial; such conviction is of no greater force than that entered upon the verdict of a jury.

Kercheval v. United States, 274 U. S. 220, 223 (1927).

(B)

The general common law rule, adopted by the Second and Fourth Circuits, and disregarded by the Court below, is that when all the alleged conspirators are before the court, a nolle prosequi as to all but one prohibits the conviction of that one.

Feder v. United States, 257 Fed. 694, 696 (C. C. A. 2, 1919);
Miller v. United States, 277 Fed. 721, 726 (C. C. A. 4, 1921).

Such holding is required by the very meaning of the crime of conspiracy. Since "It is impossible in the nature of things for a man to conspire with himself," (*Morrison v. California,* 291 U. S. 82, 92 (1933), the crime is indivisible and therefore, as pointed out in the *Feder* case, supra, the guilt of at least two must be established.

This principle finds frequent expression in the rule that where all but one are acquitted, that one must also be acquitted.

Feder v. United States, supra;
Worthington v. United States, 64 Fed (2nd) 936 (C. C. A. 7, 1933).

An application of the principle closely allied to the present case is that, where all the alleged conspirators

are before the court, a reversal as to all but one, requires a reversal as to that one also.

Feder v. United States, 257 Fed. 694 (C. C. A. 2, 1919);

Cofer v. United States, 37 Fed. (2nd) 677, 680 (C. C. A. 5, 1930);

Turinetti v. United States, 2 Fed. (2nd) 15, 17 (C. C. A. 8, 1924);

Bartkus v. United States, 21 Fed. (2nd) 425, 428 (C. C. A. 7, 1927);

Morrow v. United States, 11 Fed. (2nd) 256, 260 (C. C. A. 8, 1926);

Williams v. United States, 282 Fed. 481, 484 (C. C. A. 4, 1922);

Silk v. United States, 19 Fed. (2nd) 73 (C. C. A. 8, 1927).

These cases proceed upon the theory that even though two or more have been found guilty, the indivisibility of the crime requires (in a case where all are before the court), that *at least two must at all times stand convicted or none can be;* so that if a new trial is ordered as to all but one, that one must have the benefit of it, lest after the new trial he be the only one convicted.

Furthermore, under these decisions it is clearly immaterial whether the nolle prosequis followed or preceded petitioner's conviction.

The decision of the Court below comes into violent conflict with the principle underlying these decisions. In two major respects the opinion discloses the conflict and points to the error in the decision of this case:

(1) In holding that "the rule that the acquittal of all save one of the alleged conspirators results in the acquittal of all applies to acquittals on the merits" (R. 95).

There is no rule as to "acquittal" per se. The rule,—as established in the various circuits by the cases above cited,—concerns itself with convictions, not acquittals, and requires that where all the alleged conspirators are before the court, at least two must be *convicted.* Moreover, in several of the foregoing cases involving reversals, the reversal was directed for procedural reasons and not because of the merits of the case; consequently "merits" has nothing to do with such a situation.

Therefore, attempts to distinguish between an acquittal and a nolle prosequi (R. 97), lead nowhere. This first misconception leads directly to

(2) The reasoning that the nolle prosequi was not incongruous or inconsistent with petitioner's conviction, because neither the guilt nor the innocence of the two co-defendants had been established and they might, therefore, be reindicted and re-tried (R. 98).

In the cases involving reversals for procedural errors below, new trials were ordered, so that there was no determination at that time of the innocence or the guilt of the defendants as to whom error required a reversal. Nevertheless, the sole remaining defendant, whose conviction was not founded on error, was also held entitled to a new trial. That the other defendants could or would be re-tried was of no importance in the disposition of the case of the sole remaining defendant; what was controlling in his case was that he could not stand alone convicted.

The only cases in which the conviction of one alone has been sustained are those in which there were unapprehended defendants, or in which the indictment charged conspiracy with persons unknown and the evidence sustained such charge.

Rosenthal v. United States, 45 Fed. (2nd) 1000, 1003 (C. C. A. 8, 1930);
Grove v. United States, 3 Fed. (2nd) 965, 967 (C. C. A. 4, 1925) cert. den. 45 Sup. Ct. 511;
Didenti v. United States, 44 Fed. (2nd) 537, 538 (C. C. A. 9, 1930).

The only authority which the Circuit Court below was able to find to support its position was *United States v. Rindskopf, et al.,* 27 Fed. Cases No. 16,165, D. C. W. D. Wisconsin (1874). The report of the case contains the charge of the District Court Judge to the Jury and his opinion denying motions for new trial and in arrest of judgment. While a portion of the charge may be construed as supporting the decision of the Circuit Court below, a careful reading of the opinion of the District Court Judge does not show that this portion of the charge was attacked nor is any consideration given to it in the opinion. Moreover, there was no conviction under this portion of the charge. We respectfully submit that this District Court case is far from respectable authority to justify the action of the Circuit Court below.

(C)

Since in matters of criminal trial procedure where not specifically governed by statute, the common law governs (R. S. sec. 722, 28 U. S. C. A. Sec. 729), it is pertinent to test the decision of the Circuit Court below against the holdings of the state courts on this question, all of which support petitioner's contentions and emphasize the principle applied in the various Circuit Court cases above cited.

Casper v. State, 47 Wis. 535, 2 N. W. 1117 (1879);

State v. Jackson, 7 So. Car. 283 (1876);

Commonwealth v. Faulknier, 89 Pa. Super. 454 (1926).

Point II.

Petitioner Should Have Been Permitted to Withdraw His Guilty Plea.

Petitioner submitted to the trial court undisputed proof that his plea of guilty was entered pursuant to an agreement with an authorized representative of the Attorney General of the United States, whereby he was to be permitted to withdraw his plea in the event his co-defendants were not convicted. Under the terms of that agreement, petitioner was obligated to make full disclosure and testify as a witness for the government. Petitioner admittedly carried out that obligation and, as the Circuit Court below said (R. 100):

> ". . . not only avoided, for the public authorities, the difficulties and expense of trial, but gave testimony for the Government in the case of those who did stand trial."

The co-defendants were not convicted. Despite the fact that the Attorney General had agreed to and did consent to the withdrawal of petitioner's guilty plea and actually joined in the application for such withdrawal, the District Court refused to permit the guilty plea to be withdrawn and the Circuit Court affirmed its action.

Admittedly, the withdrawal of a plea of guilty is a matter within the discretion of the trial court. It is equally well established, however, that the court must exercise

sound judicial discretion in passing upon such an application.

The Circuit Court below has come into sharp conflict with what appears to be the only other Circuit Court decision on the subject, that of the Sixth Circuit in *Ward v. United States*, 116 Fed. (2nd) 135 (1940), the facts of which were strikingly similar to this case. That was also a conspiracy case in which Ward pleaded guilty and testified for the government under an agreement relating only to the sentence to be imposed. None of the other defendants were convicted. Ward, upon learning that the trial court did not intend to follow the government's recommendations as to sentence, moved to withdraw his plea. The Circuit Court held that it was an abuse of discretion for the trial court to deny the motion if it did not intend to be bound by the agreement.

Here the facts are even more favorable to the petitioner, because the agreement, itself, dealt with the vital right to stand trial, whereas in the *Ward* case the agreement did not involve Ward's right to trial, but merely the punishment to be meted out.

The Circuit Court below gave greater importance than did the court in the *Ward* case to the fact that petitioner's counsel was advised that the agreement would be subject to review by the court and from that fact cites the language of the *Ward* decision to arrive at a conclusion opposite to the one reached in that case (R. 99). However, the further fact that the government attorney in charge of the present case offered to permit withdrawal of the plea after the first trial conclusively shows that it was the understanding of both petitioner and the government that only the conviction of the co-defendants would disallow the application and that the court would follow the govern-

ment's recommendation in any event. From this and from the government's subsequent consent to, and joinder in the motion to withdraw, it clearly appears that no thought ever existed in the mind of either party that the court would not favor the application. The entire course of conduct of both petitioner and the government leaves no room to suspect that petitioner ever had reason to understand that the consequences of his plea would be to deprive him of his right to stand trial if the others were not convicted.

Petitioner had a constitutional right against self-incrimination. He had a constitutional right to trial upon the indictment. He waived both rights solely in reliance upon the government's promise. In the absence of evidence of improper dealing, justice and protection of fundamental rights required a favorable review of the stipulation by the Court. The law should be particularly considerate of one who in good faith has acted upon the inducement of a prosecuting officer and later seeks to stand upon his right to a trial.

An exhaustive search of the reported decisions, both federal and state, fails to disclose a single instance where leave to withdraw a plea of guilty was denied in the face of an undisputed agreement to permit such withdrawal.

See:

Griffen v. State, 12 Ga. App. 615, 77 S. E. 1080 (1913);

People v. Griggs, 17 Cal. (2d) 621, 110 Pac. (2d) 1031 (1941);

State v. District Court, 81 Mont. 495, 263 Pac. 979 (1928);

People v. Whipple, 9 Cow. (N. Y.) 707 (1827).

Nor is there a single instance where such leave was denied where the prosecuting official who made the agreement joined in the application therefor. To establish such a precedent would be contrary to all recognized principles of law and equity.

The fact that the Attorney General joined in the application was, in and of itself, a sufficient guarantee that the withdrawal of the plea would not be inimical to the proper administration of justice.

Ponzi v. Fessenden, 258 U. S. 254, 262 (1921).

The District Court, however, proceeded to decide for itself whether the Attorney General's consent to and joinder in the application accorded with the "proper administration of justice" (R. 57a) and its decision was therefore based solely upon the conclusion that they did not. In holding that such decision was correct, the Circuit Court below, therefore, has completely ignored the importance of the Attorney General's interest and position in the proper administration of justice.

Point III.

Conclusion.

The writ of certiorari prayed for herein should be granted.

Respectfully submitted,

ABRAHAM L. FREEDMAN,
Attorney for Petitioner.

MORRIS WOLF,
Of Counsel.

INDEX

CITATIONS

487270—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 372

WILLIAM FOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court denying petitioner's motion to vacate the judgment of conviction and sentence and to dismiss the indictment (R. 84–86) is reported in 43 F. Supp. 582. The opinion of the circuit court of appeals (R. 94–100) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 4, 1942 (R. 100). The petition for a writ of certiorari was filed September 3, 1942. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the entry of a judgment of *nolle prosequi* as to two of three alleged conspirators renders void a judgment of conviction previously entered against the other conspirator on a plea of guilty.

2. Whether the trial court abused its discretion in denying petitioner leave to withdraw his plea of guilty.

STATEMENT

The petitioner and two others—J. Warren Davis, formerly a judge of the United States Circuit Court of Appeals for the Third Circuit, and one Morgan S. Kaufman—were indicted in one count for conspiracy to obstruct the administration of justice and to defraud the United States by corruptly influencing Davis in his decisions and actions in matters coming before him as circuit judge (R. 8–22). Petitioner pleaded guilty (R. 1). After two trials of his co-defendants had ended in disagreements among the jurors, petitioner moved for leave to withdraw his plea (R. 23). The motion was denied and sentence was imposed (R. 37, 39, 42). Subsequently, after a *nolle prosequi* had been entered as to his co-defendants, petitioner moved to vacate

the judgment and sentence and to dismiss the indictment (R. 80–83). This motion, too, was denied (R. 87–88). On appeal the circuit court of appeals affirmed.

The relevant facts are as follows:

During the investigation preceding the return of the indictment against petitioner, Davis and Kaufman, Hugh A. Fulton, Esq., the special assistant in charge of the investigation, indicated to petitioner that the Government would give him consideration if he would tell all the facts that he knew about the matter under investigation and make himself available as a witness for the Government. Petitioner then consulted Martin W. Littleton, Esq., an attorney, and revealed to him his knowledge of the matter and told him of his discussions with Mr. Fulton. In considering what course to follow, petitioner was concerned as to what disposition would be made of his case if he should plead guilty and subsequently his co-defendants should not be convicted. Mr. Littleton consulted Mr. Fulton who told him "that should such an unlikely situation arise the Government would not oppose the withdrawal of a plea of guilty but would consent to such withdrawal" (R. 64). However, Mr. Fulton pointed out to Mr. Littleton at that time that the disposition of the matter would have to be made by the court (R. 65, 70). Petitioner thereupon determined to plead guilty and to assist the Government in the prosecution. (R.

59–60, 63–64, 69, 70–71.) Accordingly, prior to the return of the indictment petitioner furnished the Government with a statement as to his participation in the acts charged in the indictment and testified before the grand jury (R. 64–65). After the indictment was returned, he entered a plea of guilty (R. 1).

Petitioner testified at the first trial of Davis and Kaufman, who had pleaded not guilty (R. 1, 2), and repeated the story which he had told during the investigation and to the grand jury. Nevertheless, the jury disagreed (R. 3). After this trial Government counsel asked petitioner if he desired to withdraw his plea and stand trial with his co-defendants, but petitioner declined (R. 65, 71). Subsequently, Davis and Kaufman were tried a second time and petitioner again testified for the Government; but again the jury disagreed (R. 5).

On October 21, 1941, about two months after the termination of the second trial (see R. 5), petitioner moved in open court for leave to withdraw his plea of guilty (R. 23) on the ground that since the trials of Davis and Kaufman had resulted in disagreements of the juries, the criminality of the defendants' conduct was not established and petitioner should therefore be allowed to stand trial on the indictment (R. 24–36). The United States Attorney opposed the motion; he had no knowledge of the commitment made by Mr. Fulton, who by that time had dissociated himself from the

case (R. 66). The motion was denied (R. 37) and petitioner was sentenced to imprisonment for one year and a day, and to pay a fine of $3,000 (R. 39, 42).

On November 24, 1941, a judgment of *nolle prosequi* was entered as to the defendants Davis and Kaufman (R. 6, 43, 85). On December 1, 1941, petitioner filed in the district court a motion to vacate the judgment and sentence entered on October 21 and for leave to withdraw his plea of guilty and substitute a plea of not guilty, or, in the alternative, for a reconsideration of the sentence (R. 58–70). In support of the motion, petitioner brought to the attention of the court for the first time the understanding reached between himself and Mr. Fulton (R. 70–71; see also R. 59–60, 63–64, 69). The United States Attorney also explained that he had opposed petitioner's first motion for leave to withdraw the plea of guilty because he had not been advised of the understanding (R. 52), and stated that, having since been informed of the circumstances, he did not oppose the renewal of petitioner's motion (R. 53). He also informed the court that it was the desire of the Attorney General that petitioner be allowed to withdraw his plea (R. 57). On December 4, 1941, the district court denied petitioner's motions (R. 77–78).

On January 28, 1942, petitioner filed in the district court a motion to vacate the judgment and sentence and to dismiss the indictment on the

ground that, as a matter of law, the judgment of conviction and the sentence imposed thereon were void because the entry of the judgment of *nolle prosequi* as to Davis and Kaufman "destroys the basic requirement for the existence of a conspiracy, to wit: that two or more persons must act in concert for the commission of a crime" (R. 80–83). This motion was denied (R. 84–86).

On appeal the court below held (1) that the district court did not abuse its discretion in denying petitioner leave to withdraw his plea of guilty and (2) that the entry of the *nolle prosequi* as to Davis and Kaufman did not invalidate petitioner's conviction (R. 94–100); accordingly, the judgment of the district court was affirmed (R. 100).

ARGUMENT

I

There is no occasion for further review of petitioner's contention that because the crime of conspiracy is indivisible, his conviction and sentence on a plea of guilty were rendered void by the *nolle prosequi* subsequently entered as to his alleged co-conspirators.[1] For although the general

[1] At the oral argument in the court below the Government in effect abandoned any reliance upon the residuary clause of the indictment charging that the defendants conspired "with divers other persons whose names are to the Grand Jurors unknown" (R. 8), because there was no evidence at the trials of Davis and Kaufman that anyone other than they and petitioner participated in the alleged conspiracy (R. 96).

field is confused, the decision below applied the principles of the law of conspiracy correctly, and in a way which raises no conflict of decisions.

By definition the crime of conspiracy cannot be committed by one person alone; hence it is often said that the acquittal of all but one conspirator requires the acquittal of that one also. Likewise, where the evidence is held on appeal to have been insufficient as to all but one, the conviction of that one must be reversed.[2] The soundness of those rules seems unquestionable if they are limited to instances in which all the conspirators are tried on the merits on the same evidence.[3]

But even without the limitation, those rules are not decisive of the instant case. Petitioner has, by his own plea, admitted his guilt; the *nolle prosequi* as to Davis and Kaufman determined neither their guilt nor innocence; hence, nothing in the definition of a conspiracy precludes the conviction of petitioner. The decisive principle was established in *Regina* v. *Ahearne,* 6 Cox C. C. 6:

Where three persons are tried separately, under an indictment charging them with conspiracy, and

[2] *Turinetti* v. *United States*, 2 F. (2d) 15 (C. C. A. 8), and *Bartkus* v. *United States*, 21 F. (2d) 425 (C. C. A. 7), cited by petitioners (Pet. 15), fall into this category.

[3] It cannot be said that the limitation suggested has been recognized by the courts, but neither has it been conclusively rejected. It appears to be a necessary qualification. There is no injustice or incongruity in acquitting two of three conspirators because the evidence is insufficient and convicting

one is found guilty before the trial of the other two, the possibility that the others may be acquitted is not a sufficient reason for holding the judgment of conviction of the one irregular.

The federal courts have uniformly applied this principle in cases where the co-defendants had not been tried or even apprehended. *Miller* v. *United States,* 277 Fed. 721 (C. C. A. 4); *De Camp* v. *United States,* 10 F. (2d) 984 (App. D. C.); *Rosenthal* v. *United States,* 45 F. (2d) 1000 (C. C. A. 8). The principle was precisely applicable to the present case at the time when petitioner was sentenced, for the *nolle prosequi* had not then been entered and the co-defendants were awaiting a third trial on the merits. Entry of the *nolle prosequi* did not make any substantive change in the situation; it simply left unsettled the issue of the co-defendants' guilt or innocence. At most, it gave them a personal immunity from prosecution under a new indictment on the ground that jeopardy had attached before the *nolle prosequi* was entered.[4] But the personal immunity of his co-conspirators from prosecution and punishment would not prevent or vitiate the conviction of petitioner. *Farnsworth* v. *Zerbst,* 98 F. (2d) 541, 544 (C. C. A. 5).

---

the third against whom alone a confession is admissible or an additional witness available.

[4] *Clawans* v. *Rives,* 104 F. (2d) 240, 242–243 (App. D. C.); cf. *Wolff* v. *United States,* 299 Fed. 90, 91 (C. C. A. 1).

Because petitioner was sentenced before the *nolle prosequi* was entered, it is unnecessary to consider the correctness of *State* v. *Jackson,* 7 S. C. 283, upon which petitioner principally relies. In that case it was held that after a *nolle prosequi* had been entered as to one of two defendants, the indictment would not support a judgment of conviction as to the other, because the effect of the *nolle prosequi* was to leave the indictment inoperative for "alleging a conspiracy by one alone" (p. 288). Contra: *United States* v. *Rindskopf,* 27 Fed Cas. No. 16,165 (W. D. Wis.). By its very terms that decision rested upon a technical rule of pleading which is inapplicable where the judgment has been entered on the indictment before it is rendered inoperative, and which is in no way inconsistent with the principle that one conspirator may be convicted alone even though his co-defendants may never be convicted. The distinction was observed in *Miller* v. *United States,* 277 Fed. 721 (C. C. A. 4); the court stated the holding of the *Jackson* case but differentiated it from a case like the present, in which the judgment preceded the *nolle prosequi,* saying (p. 726):

> What would be the effect of a future acquittal of [the only co-conspirator], or a nol. pros. of the indictment as to him, it is not our province at this time to decide.

Feder v. *United States,* 257 Fed. 694 (C. C. A. 2), the third case cited by petitioner as in conflict

with the decision below, goes no farther than to state *obiter* the holding of the *Jackson* case with apparent approval.

Likewise, there is no conflict in principle between the decision below and the rule that a reversal as to all but one conspirator necessitates a reversal as to him also.[5] Any error resulting in the conviction of the others affects the substantial rights of the one because their acquittal would have required his acquittal. It is for that reason that a reversal is granted as to all, and not because one cannot be convicted unless the others are convicted also.

For the foregoing reasons we submit that as to the first question presented the petition for a writ of certiorari should be denied.

II

The second question presented challenges the action of the district court in denying leave to withdraw the plea of guilty. Before the plea was entered, the Government undertook not to oppose a motion to withdraw it. At the hearing on petitioner's second motion[6] the United States Attor-

[5] The cases are collected at page 15 of the petition for a writ of certiorari.

[6] Both motions for leave to withdraw the plea were made more than six months after the plea was entered and the second motion was made after sentence was imposed (R. 1, 5, 6). Rule II (4) of the Criminal Appeals Rules provides: "A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is im-

ney, acting on instructions from the Attorney General, stated that not only did he not oppose the motion but that it was the Government's desire that the motion should be granted. We believe that this recommendation should have been followed. For these reasons, we do not oppose petitioner's request for further review of the district court's action. It is proper, however, that we should indicate the nature of the question which will be before the Court if further review is granted.

A trial court has wide discretion in ruling on a motion for leave to withdraw a plea of guilty.[7] Petitioner does not deny this or suggest that

posed." We mention the rule because we do not wish to seem to foreclose the Government from contending in other cases that after the time limit has expired the district court cannot allow a change of plea. See *Cooke* v. *Swope*, 28 F. Supp. 492, 494 (W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9). We make no such contention in this case because it would be inconsistent with the understanding between petitioner and the representative of the Government. For the same reasons we mention but specifically refrain from reliance upon the fact that when the second motion was made and the Government corrected the mistake made earlier, an appeal had been taken and the case was within the control of the appellate court. See *Tinkoff* v. *United States*, 86 F. (2d) 868 (C. C. A. 7), certiorari denied, 301 U. S. 689.

[7] *Rachel* v. *United States*, 61 F. (2d) 360 (C. C. A. 8); *Fogus* v. *United States*, 34 F. (2d) 97 (C. C. A. 4); *Gleckman* v. *United States*, 16 F. (2d) 670 (C. C. A. 8); *Camarota* v. *United States*, 2 F. (2d) 650, 651 (C. C. A. 3); *United States* v. *Denniston*, 89 F. (2d) 696, 698 (C. C. A. 2), certiorari denied, 301 U. S. 709; *Scheff* v. *United States*, 33 F. (2d) 263, 264 (C. C. A. 8); *United States* v. *Lieberman*, 8 F. (2d) 318 (E. D. N. Y.).

there are any grounds for alleging an abuse of discretion other than those growing out of the understanding between petitioner and his attorney, and Mr. Fulton as representative of the Government. Compare *United States* v. *Lieberman,* 8 F. (2d) 318 (E. D. N. Y.). Petitioner's argument apparently is that the understanding made it obligatory for the district court to permit the withdrawal (1) because the request of the Attorney General was binding upon the district court and (2) because when he pleaded guilty as a result of the understanding, he mistakenly believed that he would be permitted to withdraw the plea if his co-defendants were not convicted.

1. As a matter of principle it seems clear that the district court was not obliged to permit withdrawal of the plea because the Government, at the direction of the Attorney General, requested it. The courts have to perform their duties independently and cannot leave the administration of criminal law merely to the stipulation of parties. *Young* v. *United States,* 315 U. S. 257.

2. No decision of this Court or body of decisions of the inferior federal courts marks the limits of the discretion of a district court when a defendant seeks to withdraw a plea of guilty on the ground that he misapprehended its consequences. There are, however, several relevant decisions which draw upon the state cases for criteria.

In *Ward* v. *United States,* 116 F. (2d) 135 (C. C. A. 6), the facts were these: the defendant

was asked by the attorneys for the United States to change his plea to a plea of guilty and to testify against his co-defendants; he did so in reliance upon their assurance, made after consultation with the judge, that a plea of guilty would result in no more than a fine or suspended sentence; later, after a disagreement of the jury as to the co-defendants, he learned that he was to be sentenced to jail and sought to alter his plea; the district judge denied the motion; the Government confessed error and the circuit court of appeals reversed the judgment of the district court. Accord: *Griffin* v. *State,* 12 Ga. App. 615; *East* v. *State,* 89 Ind. App. 701.

On the other hand, there are obvious limits to the extent to which a defendant may enter a plea of guilty upon a guess as to the trial court's future action and then withdraw it because he is disappointed. Thus, in *Camarota* v. *United States,* 2 F. (2d) 650 (C. C. A. 3), it was said that the failure of the trial court to follow the United States Attorney's recommendation did not entitle the defendant to withdraw a plea of guilty made after the United States Attorney had plainly informed him that he might be sentenced to imprisonment but had promised to recommend a small fine as an adequate sentence. Numerous decisions by the state courts support the principle underlying this ruling. *People* v. *Miller,* 114 Cal. 10, 16; *People* v. *Manriquez,* 188 Cal. 602, 605–606; *People* v. *Bonheim,* 307 Ill. 316; *People* v.

Jankowski, 339 Ill. 558, 567; *Lamick* v. *State,* 196 Ind. 71; *Mastronada* v. *State,* 60 Miss. 86; *State* v. *McAllister,* 96 Mont. 348; *Marjo* v. *State,* 70 Okla. Cr. 369; *State* v. *Wood,* 200 Wash. 37; *State* v. *Stevenson,* 67 W. Va. 553, 557.

The decisive distinction between the two groups of cases cited above appears to be that in the first group the defendant acted in reliance upon assurances that he definitely would not receive a severe sentence, whereas in the second group he understood the alternatives and simply guessed wrong as to which would be followed. Cf. *State* v. *McAllister,* 96 Mont. 348. Although the cases deal with mistakes as to the sentence to be imposed on a plea of guilty,[8] it seems obviously proper to generalize the differentiation so as to distinguish in all cases between a plea entered in ignorance of the potential consequences and a plea entered with full knowledge of the potentialities but upon a mistaken guess as to which would be followed. Consequently, it seems that if certiorari be granted in the present case the Court will have to decide the simple factual question of whether petitioner understood that the district court would have discretion to deny him leave to withdraw his plea even though the Government assented.

[8] In *People* v. *Junod,* 85 Cal. App. 194, it was held that it was not an abuse of discretion to deny leave to withdraw a plea of guilty entered by defendant on his attorney's advice that he could withdraw it if he was not placed on probation. No other cases dealing with such a mistake have come to our attention.

On that point the record is as follows: Before petitioner pleaded guilty, he was given to understand that the Government would not oppose his changing his plea and standing trial if Davis and Kaufman were not convicted. The Government made no further representation and it fulfilled this obligation. Although it opposed the first motion for leave to withdraw the plea of guilty as a result of the confusion caused by a change in personnel, nevertheless upon learning the facts it changed its position and urged the court to grant the second motion. We do not understand that any prejudice is alleged to have resulted from the mistake and we think that the colloquies at the hearings show that the mistake was immaterial.

The record does not show explicitly whether petitioner, although not misled by the Government, nevertheless misapprehended the nature of the proceedings that would occur on a motion to withdraw the plea of guilty, or believed that the judge must allow the motion if the Government consented. The verified motion and attached affidavits set forth, however, not that petitioner was advised that leave to withdraw the plea would be granted, but that he was informed that the Government would not oppose such a motion (R. 60, 64; cf. R. 69). Second, petitioner was being advised at all times by experienced attorneys, so that he may have been told, while the question was being so carefully canvassed, that

the court would not be bound to allow him to change his plea even though the Government consented. Third, in a letter from Mr. Fulton to the district judge, which was attached to petitioner's motion papers as a substantially accurate account of what occurred (R. 65), Mr. Fulton stated that he had advised petitioner's attorney that if the co-defendants were not convicted (R. 70)—

> that the disposition of the matter in any such event would be made by the Court, but that my personal position would be that I would not argue against a request on Fox's behalf for permission to withdraw his plea and stand trial. * * *
>
> Mr. Littleton informed me that Mr. Fox had thereupon assumed that the matter would, in the event that Judge Davis should be acquitted, be determined by the Court without opposition from the Government. * * *

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
ARCHIBALD COX,
Attorneys.

OCTOBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942